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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 584.

SEABOARD AIR LINE RAILROAD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee,

INTERSTATE COMMERCE COMMISSION,
ATLANTIC COAST LINE RAILROAD COMPANY,
Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

PETITION FOR REHEARING.

JAMES B. McDONOUGH, JR.,
Counsel for Plaintiff-Appellant, Seaboard Air Line Railroad Company Building,
Plume and Granby Streets,
Norfolk 10, Virginia.

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PETITION FOR REHEARING.

On Monday, April 11, 1955, a *per curiam* decision was announced by this Court, to-wit, "The motions to affirm are granted and the judgment is affirmed." This petition for rehearing is filed pursuant to paragraph 1 of Rule 58 of the Revised Rules of this Court, and is supported by certificate of counsel that it is presented in good faith and not for delay.

We respectfully submit that the Commission's order did open a new route or routes contrary to the restrictions of Section 15(4) of the Interstate Commerce Act, with extraordinary consequences. The situation is not one that is saved by the Commission's expertise.

Statement of Grounds for Rehearing.

On May 3, 1955, counsel for the appellant, after prior notice to counsel for the other parties of his intention, personally presented to the Honorable Richard F. Mitchell, Chairman, Interstate Commerce Commission, the following letter:

May 3, 1955.

Honorable RICHARD F. MITCHELL, Chairman,
Interstate Commerce Commission,
Washington 25, D. C.

Dear Sir:

This letter is to request an extension of the effective date of the Commission's order of July 30, 1954, as modified October 11, 1954, in Docket No. 30882, *Atlantic Coast Line Railroad Company* v. *Seaboard Air Line Railroad Company*, commonly called the *Thalmann Interchange Case*.

Unless the requested extension is granted we believe that this Company will be deprived of an opportunity and of rights to which it is entitled as a matter of fair play and simple justice. The United States Supreme Court, on April 11, 1955, affirmed the judgment upholding the Commission's order, and we are appealing to the Commission as a matter of grace, although the time for filing a petition for rehearing with the United States Supreme Court has not expired and will not expire until May 6, 1955.

The Coast Line pointed out to the Supreme Court, with respect to the routes with the Coast Line via Thalmann that:

> "Neither party has attempted to withdraw from that service."

and

> "The route has never been cancelled and neither party has sought to cancel it."

The Seaboard is now seeking to cancel all specific routing through Thalmann, and it should have the right to be heard as to whether such cancelation is "consistent with the public interest," *an issue which has not been heard or determined by the Commission.*

The Commission found (emphasis supplied):

> "The defendant [Seaboard] is obligated, under section 3(4) of the Act, to provide reasonable and proper facilities for the interchange of traffic at an interchange point *in lieu of Thalmann,* with due regard for the public interest."

The Commission found, on the assumption that the routes through Thalmann were to be continued, that the proposed route through Jacksonville was needed. *The Commission made no finding that the routes via Thalmann were needed or necessary in the public interest. That issue was not before the Commission, nor decided by it.*

If the Seaboard can sustain the burden that the cancelation of the specific routes via Thalmann is consistent with the public interest, the Commission's order of July 30, 1954, will not operate to require the establishment of such routes via Jacksonville. If the Seaboard can cancel the routes through Thalmann, and the Coast Line still desires routes via Jacksonville, such routes can only be opened after compliance with Section 15(4) and not under the theory of mere substitution of an interchange point.

If the Commission will not suspend the operation of the order of July 30, 1954, the Seaboard will be cut off from the opportunity to cancel the routes via Thalmann, for once the order becomes effective it requires the automatic substitution of Jacksonville for Thalmann, and if the Seaboard desires to protect its long haul it will thereafter be compelled to sustain the burden of proving that the cancelation of the routes *via Jacksonville* is consistent with the public interest.

We point out another matter that lends equity to our position and present request.

For northbound traffic, the lines of the Coast Line do not reach Thalmann. For northbound traffic the lines of the

Coast Line do reach Jacksonville. The Commission's order allows the Coast Line to solicit Seaboard originated traffic at Jacksonville, which the Coast Line could not do before, for movement beyond over the Coast Line, but it does not give the Seaboard the right to solicit Coast Line originated traffic at Jacksonville for movement beyond over the Seaboard.

On southbound traffic, the rails of the Seaboard do not reach Thalmann, but on southbound traffic they do reach Jacksonville. The Commission has ordered the Seaboard to take at Jacksonville traffic from the Coast Line which would otherwise move into Jacksonville over Seaboard rails, but it has not required the Coast Line to open routes that would require the Coast Line to take at Jacksonville traffic from the Seaboard which would otherwise move into Jacksonville over Coast Line rails.

If the Seaboard can sustain the burden of cancelling the routes via Thalmann the two carriers will be on an equal footing. If the Coast Line thereafter wants to open routes through Jacksonville for Seaboard originated and terminated traffic, the Seaboard will be in a position to ask like routes through Jacksonville for Coast Line originated and terminated traffic.

The Seaboard's proposal to cancel all specific routing through Thalmann on all commodities, as submitted to the Southern Freight Association is dated April 22, 1955, and is SAL Proposal No. 11341. There are at least ten other proposals, in which the question of routing of phosphate rock via Thalmann is involved, now pending before the Southern Freight Association or this Commission, which are listed on the attached sheet marked Exhibit A.

The Commission refused to suspend the elimination of Thalmann in one of the proposals involving phosphate rock, but has suspended, at the request of the Coast Line, the tariffs that would eliminate Thalmann in another such case, and the latter case, *Investigation and Suspension Docket No. 6285,* is now set for hearing before this Commission on June 29, 1955. The basis of the Coast Line's protest was not public interest but an alleged discrimination against it in that routes with other railroads were provided via Hampton, Florida, and Savannah, Georgia.

If the Coast Line's claim of discrimination has any merit, the Seaboard may remove the basis of any such claim by canceling all routes with other connections which permit it to be short hauled, and the Seaboard should have the opportunity to protect its long-haul routes, in accordance with the spirit and intent of the Act and the National Transportation Policy.

We respectfully pray that the effective date of the Commission's order of July 30, 1954, as modified October 11, 1954, be suspended, pending the determination of the right of the Seaboard to cancel the existing specific routing in conjunction with the Coast Line via Thalmann.

In the alternative, as a minimum of relief, we ask that a new effective date be fixed. The order of July 30, 1954, as modified by the order of October 11, 1954, carried an effective date of January 15, 1955, with the usual requirement of thirty days' notice to the Commission and the general public. The enforcement of that order was enjoined during the pendency of the appeal to the Supreme Court. In any and all events we respectfully submit that an order with a new effective date, to permit the handling of the tariff changes through regular procedures and the thirty days' notice, should be entered, with an effective date not earlier than June 30, 1955.

Respectfully submitted,

/s/ JAMES B. McDONOUGH, JR.,
Assistant General Counsel.

cc The Attorney General,
United States Department of Justice,
Attention: Mr. Willard R. Memler,
Washington 25, D. C.

Mr. Edward M. Reidy,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

Mr. Richard B. Gwathmey,
General Solicitor,
Atlantic Coast Line Railroad Company,
Wilmington, North Carolina.

EXHIBIT A

Date of Proposal		Proposal
October 23, 1953		FL No. 10881
April 12, 1954	Joint	ACL No. 13460 SAL No. 10849
June 9, 1954	Joint	ACL No. 13527 SAL No. 10956
June 23, 1954	Joint	ACL No. 13584 SAL No. 10978
August 6, 1954	Joint	ACL No. 13640 SAL No. 11033
September 17, 1954	Joint	ACL No. 13698 SAL No. 11091
February 3, 1955		Frisco No. 983
February 8, 1955		Frisco No. 984
February 21, 1955	Joint	ACL No. 13903 SAL No. 11273
April 6, 1955	Joint	ACL No. 13985 SAL No. 11291

Chairman Mitchell had before him at that time the following telegram from counsel for the Coast Line:

WU 020 CAK

WILMINGTON NCAR MAY 2 1212PME

JAS B MCDONOUGH JR, ASST GEN COUNSEL

REFERRING TO LETTER DATED MAY 3 WHICH MR. MCDONOUGH OF THE SEABOARD ADVISES HE WILL SUBMIT TO YOU TOMORROW REQUESTING EXTENSION EFFECTIVE DATE COMMISSION'S ORDER JULY 30, 1954, DOCKET 30882, ATLANTIC COAST LINE RAILROAD COMPANY VERSUS SEABOARD AIR LINE RAILROAD COMPANY STOP COAST LINE STRENUOUSLY OBJECTS TO THE REQUESTED EXTENSION OR TO ANY EXTENSION OF SAID ORDER. ORIGINAL CHAIRMAN MITCHELL COPY MCDONOUGH

R B GWATHMEY

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3 30 1954 30882

The letter was presented to Chairman Mitchell at 10:00 A. M. (D. S. T.) on May 3, 1955, and counsel for the appellant was asked to return at 2:30 P. M. (D. S. T.), and did so. At that time Chairman Mitchell advised counsel for the appellant that the effective date of the Commission's order would not be postponed so as to give the Seaboard the opportunity to close the routes via Thalmann, but that he would enter an order, similar to the order of October 11, 1954 (Appendix A-3 to the Jurisdictional Statement) modifying the order of July 30, 1954, so as to become effective on June 15, 1955, with the same requirements as to notice.

The Seaboard heretofore made no effort to cancel all of the through routes and joint rates with the Coast Line via Thalmann (although it has heretofore sought and is seeking to restrict the movement of phosphate rock via Thalmann) for the simple reason that if the Seaboard took the initiative in canceling those routes the burden of proof would be upon it to show that such cancelation "is consistent with the public interest"[1] while if the Coast Line canceled the routes by abandoning Thalmann that would not have been the case. Following this Court's order of April 11, 1955, however, the Seaboard is now endeavoring to cancel all specific routing via Thalmann, even though that action has put upon it a burden it should not have been required to bear.

The Commission has now refused to give the Seaboard even the opportunity to cancel the routes through Thalmann. It is no answer to say that the Seaboard could have availed itself of that opportunity over the period of several years these proceedings have been pending before the Commission. Is the Seaboard to be held to have taken at its peril the position that the Commission was without power to open new routes via Jacksonville, and that if it lost that contention it automatically lost every other right it had to protect its long-haul routes, not only against the Coast Line but also against the Southern?

We urgently pray the Court consider the overall effect of the Commission's order. Upon the Commission's order

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[1] 49 U. S. C. Sec. 15(3); "If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, *the burden of proof shall be upon the carrier or carriers proposing such cancelation* to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section." (Emphasis supplied.)

becoming effective, giving the Coast Line routes through Jacksonville, in addition to everything else, the Seaboard will automatically be guilty of a discrimination against the Southern, unless it gives the Southern similar routes through Jacksonville.

The Seaboard will then be compelled to give both the Coast Line and the Southern routes through Jacksonville, in lieu of both Thalmann and Everett, for this Seaboard originated and terminated traffic, on which the Seaboard had heretofore thought it was entitled to protect its long-haul.

There is nothing fanciful about that statement, as we consider it will be the inevitable result, and we respectfully request the Court to reexamine the map attached as Appendix C to the Jurisdictional Statement. Under the view of the law expressed by the District Court in this case, a route in conjunction with the Southern via Jacksonville in lieu of Everett will not be a new route, and the Seaboard's rails, for the traffic involved, might as well end at Jacksonville.

There is nothing fanciful about the foregoing statement. There was attached to the petition to the Commission for reconsideration and other relief, dated February 12, 1954, a list of the Seaboard stations in Florida, totaling three-hundred and seven in number, to and from which the Coast Line contends the Commission's order will require the Seaboard to open routes with the Coast Line via Jacksonville. The same stations would have to be made open to routes with the Southern via Jacksonville.

The Coast Line sought the abandonment authority. The Coast Line initiated the series of events that produced the present situation. The Seaboard may not have taken the most adroit measures to protect itself, but we submit that the Coast Line could not prove either discrimination against it, or public interest, or circuity, entitling it to routes on

this traffic *via Jacksonville,* and that it was plain error for the Court below to find that the Commission's order did not establish new through routes, or, if it did, that the requirements of Section 15(4) had been met.

Possible annual losses of millions of dollars of Seaboard revenue, resulting from an abandonment proceeding which it did not initiate and to which it was not even a party, may not be a matter of public importance, but we believe that the abandonment proceeding led to an erroneous construction of Section 15(4) which is a matter of public importance. It seems obvious that no relief can be secured in further proceedings before the Commission, and that the only hope of relief lies in full consideration by this Court.

We respectfully submit that the Court below was in error in denying the relief sought and in dismissing the complaint.

We respectfully pray that this Court request replies to this petition for rehearing and that, upon rehearing, it vacate its order of April 11, 1955, and note probable jurisdiction.

May 6, 1955.

Respectfully submitted,

James B. McDonough, Jr.,
Counsel for Plaintiff-Appellant, Seaboard Air Line Railroad Company Building,
Plume and Granby Streets,
Norfolk 10, Virginia.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

JAMES B. MCDONOUGH, JR.,
Counsel for Plaintiff-Appellant